



## ASA DIX LEGAL BRIEF

A PREVENTIVE LAW SERVICE OF THE JOINT READINESS CENTER LEGAL SECTION  
UNITED STATES ARMY SUPPORT ACTIVITY DIX

*KEEPING YOU INFORMED ON YOUR PERSONAL LEGAL NEEDS*

# ***UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)***

**Q: What is USERRA?** USERRA (38 United States Code section 4301) protects the job rights of military reservist and National Guard personnel and is a comprehensive revision of the federal law of veterans' employment rights. USERRA applies to virtually all employers and protects the rights of those who serve with the regular component, reserve component and National Guard in active federal military service.

**Q: Which employers are covered by USERRA?** USERRA applies to all private employers, states, branches of federal government, and union hiring halls and similar entities to which employers have delegated employment-related responsibilities. There is no exception for small employers.

**Q: Who is eligible for USERRA protections?** To obtain USERRA's protections, a service member must meet each part of the following five-part test:

- (1) Job.** The service member must have had a civilian job before the period of active duty in question. All jobs are covered, except jobs for a brief, nonrecurrent period and in which there is no reasonable expectation that such employment will continue indefinitely for a significant period.
- (2) Notice.** The service member must give advance notice to the employer before leaving for active duty unless it is a classified mission or when notice is impossible. Notice can be oral or in writing, but written notice is easier to prove. The employer cannot refuse permission for an absence for military duty. While no specific notice period is provided in USERRA, a service member should provide as much advance notice as possible to his or her employer. There have been cases where courts upheld the firing of service members who withheld notice of active duty for training until the last moment.
- (3) Duration.** All service members are entitled to five years of protected absence. Absences with any one employer are cumulative and include absences protected under prior law (The Veterans' Reemployment Rights Act). The service member may be able to exclude certain absences from the five-year limit such as periodic and special Reserve and National Guard training and service connected with war or national emergency.
- (4) Character of service.** The service member must receive an honorable or general discharge for the service in question. Service members with less favorable discharges or who were dropped from the rolls because of AWOL or desertion are not protected by USERRA. If the period of absence was 31 days or longer, the employer is entitled to ask the service member for proof of character of service, listed on DD Form 214.
- (5) Timely request or reapplication for work.** The service member must return to work within a reasonable period of time after completion of service. The definition of "reasonable" depends on how long the service member was gone. For absences of up to 30 consecutive days, the service member is entitled to safe travel time from place of duty to his or her residence plus eight hours of rest. The service member must "report" to work at the beginning of the first normal shift on the full calendar day following this period. For absences of 31 to 180 days, the service member must "apply" for work not later than 14 days after completing service. USERRA does not require that applications be in writing, but it is a good idea. Service members should make clear that they

are not applicants for new employment but rather had previous positions and left work to perform military service. For absences of 181 days or longer, the service member must apply for work not later than 90 days after completing service. Service members returning from absences of 181 days or longer should make a written application and make clear that they left a previous position for military service. Extensions are possible if the service member was hospitalized for or convalescing from a service-connected injury or illness, or was otherwise unable to meet the time requirements above for reasons beyond the service member's control. Service members who don't meet the time requirements do not automatically lose the protections of USERRA; rather their cases are determined under the employer's ordinary absence and disciplinary policies.

**Q: What protections must an employer give under USERRA?** Service members are entitled to protections that apply while they are absent due to military duty, as well as upon their return to work. The following protections apply while the service member is performing military duty:

**(1) Health insurance for the service member and family members.** Upon request, service members can maintain health coverage, subject to the normal employee's contribution, for up to 30 days of service. Family members of Guard and Reserve members, called to active duty for more than 30 days, are eligible for TRICARE benefits the day their military sponsor mobilizes. TRICARE does not cover family members for tours of 30 days or less, so it makes sense for most service members with family members to continue private family member coverage for tours of 30 days or less. Service members can maintain civilian employer-sponsored health coverage for up to 18 months, at their request, but employers can charge up to 102% of the full premium under the plan, including any employer contribution.

**(2) Other Benefits.** USERRA requires an employer to treat an employee who serves in the armed forces like any other employee of similar seniority and status who is on furlough or leave of absence. For example, if the employer offers employees on furlough or leave of absence holiday bonuses, low cost life insurance or loans, etc., a serving service member-employee is also entitled to them. If the employer has more than one kind of furlough or leave of absence, the service member is entitled to the most generous treatment for comparable periods of time.

The following protections apply upon a service member's return to employment:

**(1) Prompt reinstatement.** Service members away from their civilian employment for 30 days or less are entitled to immediate reemployment and are required to report back to work at the start of the first regular shift starting at least eight hours after safe travel time from their release from duty. All other covered service members must be reemployed "promptly." USERRA does not define "prompt," but the intent of the law is reemployment within days as opposed to weeks or months. If an employer can prove that reemployment is impossible, unreasonable, or would impose an undue hardship on the employer, the employer need not reemploy the service member, but the employer has the burden of proof.

**(2) Seniority.** Service members away from their civilian employment for 90 days or less are entitled to the exact job they left. If service was more than 90 days, the employer has the option of giving the returning service member a position of like seniority, status, and pay. For all absences, USERRA incorporates the "escalator principle," which means returning employees are entitled to the same seniority they would have had if they had never left the employer for military service. If their pre-service peers were promoted or received raises in their absence, the returning service member is entitled to the same raise or promotion. Conversely, if their pre-service peers took pay cuts, or their jobs were eliminated, the returning service member gets the same adverse treatment.

**(3) Status.** Returning service members are entitled to the same status they would have attained if continuously employed. This includes job title, location, the opportunity to work during the day versus at night, and the opportunity to work in departments where there are better opportunities to earn commissions.

**(4) Training and other accommodations.** An employer must make "reasonable efforts" to train a service member on new equipment or techniques, refresh skills not used during service, and accommodate a service-connected disability, or to offer the service member alternate employment. There is some overlap between USERRA and the Americans with Disabilities Act (ADA), 42 U.S.C. § 12111, however, the ADA exempts employers with fewer than fifteen employees, while USERRA contains no such exception.

**(5) Special protection against discharge other than for cause.** If a returning service member is fired within a protected period, the employer has the burden of proving that the discharge was for cause, and not in retaliation for USERRA-protected service. The protected period is one year for service members gone for 181 days or more, and 180 days for service members gone for 31 to 180 days. Service members gone for 30 days or less are protected only by the general anti-discrimination clause of USERRA, with no specified protected period.

**(6) Immediate reinstatement of health benefits.** The employer or employer's health insurer can impose no waiting period and no exclusion of pre-existing conditions, other than for VA-determined, service-connected conditions. A returning service member is entitled to reinstatement of health coverage whether or not the service member elected to pay for health coverage through the employer during the absence.

**(7) Pension benefits.** For purposes of pension benefits, employers must count any period of service protected under USERRA as if it were service with the employer. This applies both to benefit eligibility (vesting) and to benefit computations. If the pension plan does not require employee contributions, the service member gets credit as if she or he had never left work. If the plan uses employee contributions or deferrals, the returning service member gets up to three times the period of absence (up to a maximum of five years) to make up any missed contributions.

**(8) Anti-discrimination provision.** USERRA prohibits discrimination based on military service or obligations. If military service was a factor in an employer's adverse action, the employer must prove that the adverse action would have been taken in the absence of the employee's military service or status. USERRA also prohibits retaliatory action against witnesses and those who take action to enforce USERRA protections.

**Q: Is an employer required to pay an employee while he or she is performing military duty?** USERRA does not require employers to pay individuals for time not worked due to military service. However, federal employees have a right to one-hundred and twenty (120) hours of paid military leave each fiscal year, and approximately 40 states have similar laws for state employees. Some employers prefer for employees to use vacation days or paid leave when they are performing military training. However, employees have the right to use "vacation, annual, or similar leave with pay" before beginning military service. The decision whether to take such leave prior to performing military duty is the employee's decision, and the employer cannot require the employee to do so.

**Q: What is the Reserve Income Replacement Program (RIRP)?** The RIRP is separate from USERRA and provides limited payments to activated reservists and national guardsmen if they incur a reduction in their income. The program is effective 1 August 2006 and is scheduled to expire on 31 December 2008. In order to be eligible for payments, there are specific length of service requirements, the service member must be serving in an involuntary status, and must be able to prove their civilian income was higher than their military income. Service members may verify eligibility by submitting DD Form 2919, along with the required income documents and documents verifying the period of involuntary active duty service, to the appropriate military personnel office. Assistance can be obtained from the service points of contact as listed on [www.dod.mil/ra](http://www.dod.mil/ra).

**Q: May a service member waive their rights under USERRA?** An employer may ask a departing service member to sign a statement saying the service member does not intend to return to the civilian job, or a more limited waiver of the service member's right to seniority and/or non-seniority benefits. Despite signing such a

waiver, service members never give up rights to reemployment, or the right to be treated as continuously employed for seniority purposes upon return to the job. However, a statement of non-return does waive non-seniority benefits. To be effective, a waiver must be made with full knowledge of the rights the service member is giving up, and the employer bears the burden of proof on this issue. Signing such a waiver will almost never be in a service member's best interest.

**Q: What enforcement rights are available to a service member if they believe their USERRA rights have been violated?** A service member who believes his or her USERRA rights have been violated has several options as discussed below:

(1) The service member should start by contacting the National Committee for Employer Support of the Guard and Reserve (ESGR) at 1-800-336-4590. If an ESGR Ombudsman cannot resolve the matter, the service member may file a complaint with the Veterans' Employment and Training Service (VETS), U.S. Department of Labor, 1-800-442-2838 or (202) 219-9110. If VETS cannot resolve the problem, VETS will inform the complainant of the unsuccessful outcome and further enforcement rights, which include requesting the U.S. Attorney General (in the case of a civilian employer) or the Merit Systems Protection Board (MSPB) Office of Special Counsel (if the employer is the federal government) to bring an enforcement action on the service member's behalf. Such actions are discretionary on the part of the Attorney General or the Office of Special Counsel. USERRA contains jurisdictional and remedial authority for actions by the Attorney General in U.S. District Courts.

(2) The service member may seek legal assistance from the Department of Labor (DOL) and Department of Justice (DOJ). However, the DOL and DOJ will not pursue a USERRA case if a service member is represented by an attorney including a military legal assistance attorney. Therefore, in order to preserve the service member's ability to get assistance from the DOL and DOJ, legal assistance attorneys are limited to conducting mobilization and demobilization briefings, providing sample letter formats, advising service members of the notice requirements of USERRA, advising service members of their rights under USERRA and applicable State laws, referring service members to VETS or ESGR, and providing and preparing DOL Form 1010 to open a file with VETS.

(3) Service members may file a private lawsuit against their employer.

**Q: What remedies are available to service members subjected to USERRA violations?** U.S. District Courts have broad remedial powers against private employers, to include (1) injunctive relief, (2) money damages, (3) attorney costs, (4) expert witness fees, and (5) other litigation expenses. If the court finds the employer's failure to comply with USERRA was willful, the court may award liquidated damages (in an amount equal to the actual damages) in addition to actual damages. For the purpose of remedies, states are treated as private employers. When the federal government is the employer, the MSPB may award lost wages and benefits, attorney costs, expert witness fees, and other litigation expenses, but may not order liquidated damages for willful misconduct. MSPB may also order federal agencies to comply with USERRA.

**Q: Where can I obtain more information on USERRA?** Useful information on USERRA may be found on the DOL and ESGR websites at <http://www.dol.gov/compliance/laws/comp-userra.htm> and <http://www.esgr.org>.